

ment is plainly within the regulatory power of a State. . . . The burden, such as it is, falls on foreign businesses that commingle with Minnesota people, and the burden, a fee of fifty dollars, is sufficiently small fairly to represent the cost of governmental supervision of foreign business enterprises coming into Minnesota. In short, it is a supervisory and not a fiscal measure. As such it imposes costs upon the state which those who are supervised must, as is often the case, themselves pay. See *Clyde Mallory Lines v. Alabama*, 296 U. S. 261, 267.

"The Commerce Clause does not deprive Minnesota of the power to protect the special interest that has been brought into play by Union's localized pursuit of its share in the comprehensive process of foreign commerce. To deny the States the power to protect such special interests when Congress has not seen fit to exert its own legislative power would be to give an immunity to detached aspects of commerce unrelated to the objectives of the Commerce Clause. By its own force that Clause does not imply relief to those engaged in interstate or foreign commerce from the duty of paying an appropriate share for the maintenance of the various state governments. Nor does it preclude a State from giving needful protection to its citizens in the course of their contacts with business conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration. And so we conclude that in denying Union the right to go to her courts because Union did not obtain a certificate to carry on its business as required by the Foreign Corporation Act, Minnesota offended neither federal legislation nor the Commerce Clause" (pp. 210, 211, 212).

In the light of *Union Brokerage v. Jensen*, the cases relied upon by appellant in support of its contention that no conditions whatsoever may be imposed by a State upon corporations doing an interstate business are not persuasive.* They stand only for the proposition that a specific state requirement when viewed in relation to a foreign corporation's activities in the regulating State imposed an unreasonable burden on interstate commerce.

Appellant's lead case, *Crutcher v. Kentucky*, 141 U. S. 47 (1891), invalidated a state law, which prohibited any foreign express company from doing business (including exclusively interstate business) in Kentucky unless it had a capital of at least \$150,000. As the language from the opinion quoted by appellant on page 9 of its brief makes clear, the Court held that the licensing requirements "cannot have the effect of depriving [foreign corporations] of such right" to engage in interstate commerce.

While it is obvious that many express companies (all those which had a capital of less than \$150,000) were unequivocally deprived of the right to do an interstate commerce business in Kentucky, no foreign corporation (and certainly not Eli Lilly) is deprived of the right to do an interstate business in New Jersey by that State's simple registration requirements.

International Textbook v. Pigg, 217 U. S. 91 (1910), declared unconstitutional a Kansas registration statute which was far more burdensome than the one here under review. It required, among other things, the listing of all shareholders of the foreign corporation and provided that even after compliance with its requirements, authority

*Fletcher, in his treatise on Corporations, cites the case for the proposition that "there are indications that interstate commerce may no longer serve as a barrier to qualification." 17 FLETCHER, CORPORATIONS, §422, p. 387 (Rev. Vol. 1960).

to do business in Kansas could be withheld in the discretion of State officials if they determined that the corporation's capital had been impaired. The requirement that a certificate be obtained as a condition to the corporation's access to the State's courts was invalidated only because the Court considered it unseverable from the onerous burden imposed by the filing requirements. Moreover, the subject of the lawsuit, unlike that involved in the case at bar, was to enforce an interstate contract, and hence could not have been more directly related to the corporation's interstate commerce activities.

Buck Stove Co. v. Vickers, 226 U. S. 205 (1912), adds nothing. It involved the same Kansas statute and merely followed *International Textbook*. Like that case, it involved a foreign corporation doing "a purely interstate business" (p. 214).

Sioux Remedy Co. v. Cope, 235 U. S. 197 (1914), involved an Iowa registration law which, unlike the New Jersey statute, barred all foreign corporations from suing in the State unless they complied with its registration requirements regardless of whether they were doing business in the State. Again, the suit attempted to be barred was to enforce an interstate contract, for money due on the sale of goods solicited and shipped in interstate commerce. Similarly, in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921), and *Furst v. Brewster*, 282 U. S. 493 (1931), the contracts which plaintiffs sought to enforce were contracts for the purchase or sale of goods in interstate commerce. The Court held plaintiffs were entitled to enforce such contracts without complying with the States' registration requirements. It did not appear that either plaintiff engaged in any localized activities in the State of the forum.

Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530 (1888) and *Castle v. Hayes Freight Lines, Inc.*, 348 U. S. 61 (1954), cited by appellant on page 24 of its brief, are not in point, for in both cases Congress had pre-empted the field which the States sought to regulate. See 125 U. S. 530 at 554; 348 U. S. 61 at 62 *et seq.*

Significantly, in each of the registration cases (except *Buck Store Co. v. Vickers*), the lawsuit which was barred was to enforce a contract made in interstate commerce. This was not the case in *Union Brokerage* and is not the case in the instant litigation.

Moreover, in none of the registration cases relied upon by appellant did the foreign corporation maintain an office in the State nor had it otherwise localized its activities to any appreciable extent. The importance of this distinction was recognized in *Union Brokerage Co. v. Jensen* wherein the Court distinguished the line of cases led by *International Textbook v. Pigg*, 217 U. S. 91 (1910), on the ground that "we have not here a case of a foreign corporation merely coming into Minnesota to contribute or to conclude a unitary interstate transaction." 322 U. S. 202 at 211. This is equally true with reference to Lilly's activities in New Jersey.

In an endeavour to lead the Court to believe that compliance with New Jersey's registration requirement will subject appellant to some extraordinary burden which appellant would not otherwise encounter in the prosecution of its business, appellant argues, first, that by designating a resident agent for service of process, appellant may subject itself to suits not falling within the "minimum contacts" rule of *International Shoe*, and cites *Davis v. Farmers Co-Operative Equity Co.*, 262 U. S. 312 (1923), for the proposi-

tion that the assertion of state jurisdiction in such cases is unconstitutional (brief, p. 24). As this Court made clear in *International Milling Co. v. Columbia Transportation Co.*, 292 U. S. 511, 517 (1934) and *Baltimore & Ohio R. Co. v. Kepner*, 344 U. S. 44, 51 n. 11 (1941), the *Davis* case must be strictly confined to its particular facts. Other courts have thus given a restricted reading to that decision. See *Moss v. Atlantic Coast Line R. Co.*, 157 F. 2d 1005 (C.A. 2, 1946), cert. den., 330 U. S. 839 (1947); *Harris v. American Railway Express Co.*, 12 F. 2d 487 (D. C. Cir., 1926); *Harrison v. United Fruit Co.*, 141 F. Supp. 35 (S.D.N.Y., 1956); *Standard Oil Co. v. Superior Court*, 44 Del. 538, 62 A. 2d 454 (1948), appeal dismissed for lack of substantial federal question, 336 U. S. 390 (1949).

In any event, appellant's contention that its registration in New Jersey would subject it to jurisdiction which, absent such registration, it could allegedly avoid, is not well taken. "It is established that a corporation, by seeking and obtaining permission to do business in a State does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States." *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 400 (1928). See also *Power Mfg. Co. v. Saunders*, 274 U. S. 490, 496-7 (1923); *Canadian Pacific Ry. Co. v. Sullivan*, 126 F. 2d 433, 437 (C.A. 1) cert. den., 316 U. S. 696 (1942). Appellant suggests further that its registration in New Jersey would automatically subject it to the State's franchise tax (brief, p. 25). Both the state statute imposing the franchise tax, N.J.R.S. 54:10A-2, and the tax

regulation* promulgated thereunder, N. J. Corp. Tax Bureau, Regs. 16:10-1.130, make clear that the tax is imposed, among other things, on "the privilege of doing business, employing or owning capital or property, or maintaining an office, in the State." Thus, since appellant does business in the State and maintains an office in it, the franchise tax statute would apply to appellant whether or not it registers. Moreover the statute, unlike the regulation promulgated under it, makes no mention of registration. It follows that it is not the registration requirement which subjects appellant to the tax. Registration merely serves to notify the State of New Jersey of the corporation's presence in the State.

* Reg. 16:10-1.130:

"Every corporation, not expressly exempted, is deemed to have (or to have acquired) a taxable status under the act and is required to file a return and pay a tax thereunder, if it falls within any one of the following categories:

- "(a) existing under the laws of the State of New Jersey; or
- "(b) if a foreign corporation,
 - "(1) holding a general Certificate of Authority to do business in this state issued by the Secretary of State; or
 - "(2) holding a certificate, license or other authorization, issued by any other state department or agency, authorizing the company to engage in corporate activity within this state; or
 - "(3) doing business in this state; or
 - "(4) employing or owning capital in this state; or
 - "(5) employing or owning property in this state; or
 - "(6) maintaining an office in this state."

CONCLUSION

The judgment of the lower court should be affirmed.

Respectfully submitted,

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February 8, 1961.

Proof of Service

I, one of the attorneys for Eli Lilly and Company, Appellant herein, hereby acknowledge receipt of a copy of the foregoing Brief of Appellee, Sav-On-Drugs, Inc., in the Supreme Court of the United States, this day of February, 1961.

FILE COPY

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FILED

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IN THE

JAMES B. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1960

No. 203

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC.,

Appellee,

and

STATE OF NEW JERSEY,

Intervenor-Appellee.

On Appeal From Judgment of the Supreme Court
of New Jersey

BRIEF OF INTERVENOR-APPELLEE,
STATE OF NEW JERSEY

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1960

No. 203

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC.,

Appellee,

and

STATE OF NEW JERSEY,

Intervenor-Appellee.

**On Appeal From Judgment of the Supreme Court
of New Jersey**

Counter-Question Presented

Do the requirements of the New Jersey foreign corporation registration act, N.J.R.S. 14:15-3 *et seq.*, including the sanction of denial of access to sue in New Jersey courts on contracts made in New Jersey until registration is accomplished, create a reasonable demand upon a foreign corporation engaged in extensive local activity as part of its interstate commerce, when the State interests secured by the statutory requirements are legitimately designed to protect and inform the State and its citizens of the existence and character of the foreign corporation in the state, and when the local regulations do not conflict with or impede the federal constitutional right to engage in interstate commerce?

Summary of Argument

Eli Lilly, a corporation of the State of Indiana, is engaged in both inter and intrastate commerce. The interstate aspects include the manufacture of its products, and subsequent shipment and sale to wholesalers, including those located in New Jersey. In addition, as part of its interstate activity, Eli Lilly has entered into a number of fair trade agreements executed between Eli Lilly in Indiana and New Jersey retail druggists. Eli Lilly maintains an office in Newark, New Jersey and employs 18 detail men to promote its products and police its fair trade agreements as against both signers and non-signers. The conduct of its promotional activities constitutes intrastate commerce.

The New Jersey Foreign Corporation Act N.J.R.S. 14:15-3 *et seq.* requires all corporations transacting business in the State to register and file certain information related to the protection of the State and its citizens. Until such a corporation registers it is prohibited from maintaining an action in contract in the courts of this state. Eli Lilly has not registered despite the intrastate activity.

The trial court properly dismissed the action commenced by Eli Lilly.

The propriety of the trial court's action is evident, when the intensive local character of Eli Lilly's promotional activities are examined. That a state may regulate that part of interstate business carried on locally, is an accepted doctrine of this Court. *Paul v. Virginia*, 8 Wall, 168 (1868).

A second basis upon which the New Jersey statute may be applied to Eli Lilly, is grounded in the fact that the New Jersey Fair Trade Law, as applied to a non-signer, is so essentially local in character, as to constitute an expression of parochial activity, even for a corporation otherwise exclusively engaged in interstate commerce. *Sunbeam Corp. v. Winting*, 185 F. 2d 903 (3rd Cir. 1950); *Max Factor and Co. v. Koonsman*, 5 Cal. 2d 446, 55 P. 2d 177, 187 (1936).

Finally, even if it is found that the New Jersey foreign corporation act does, by its operation regulate interstate commerce, the act is so protective in its nature as to constitute regulation so reasonable in its application to Eli Lilly's local activity, as not to contravene the commerce clause of the United States Constitution.

Union Brokerage Co. v. Jensen, 322 U. S. 202 (1944).

Counter-Statement of Facts

Eli Lilly and Company, an Indiana corporation (hereinafter referred to as "Eli Lilly"), plaintiff-appellant, appeals from a final judgment of the Supreme Court of New Jersey affirming the dismissal of Eli Lilly's complaint in the New Jersey Superior Court, which sought to enforce the terms of the New Jersey Fair Trade Laws (N.J.R.S. 56:4-3), and more particularly its non-signer provisions (N.J.R.S. 56:4-6), by securing injunctive relief and monetary damages against the defendant-appellee, Sav-On-Drugs, Inc., a New Jersey corporation (hereinafter called "Sav-On") for allegedly selling Eli Lilly products below those minimum resale prices established by Eli Lilly.

The dismissal was based on the grounds that Eli Lilly, an Indiana corporation, had not yet complied with the provisions of N.J.R.S. 14:15-3 *et seq.* which requires, generally, that foreign corporations transacting any business in New Jersey file with the New Jersey Secretary of State a copy of its corporate charter and a statement containing (a) the amount of its authorized capital stock and the amount issued, (b) the character of the business to be transacted in the State, and (c) the principal office of the corporation in the State and the name of the registered agent upon whom process could be served. For failure to comply with the requirement, N.J.R.S. 14:15-4, Eli Lilly was prohibited from maintaining an action based upon the implied contract created by the non-signer provision of the New Jersey Fair Trade Law.

On appeal from the trial court, the New Jersey Attorney General intervened, in accordance with New Jersey Supreme Court Rule, R.R. 4:37-2, to defend the validity of a statute whose constitutionality was questioned. After certifying the cause on its own motion, the New Jersey Supreme Court affirmed the judgment of the Superior Court, Chancery Division, on the opinion below (R-47; 31 N.J. 591 (1960)).

Eli Lilly is the manufacturer of pharmaceutical products in the State of Indiana. Its products are shipped and sold to local wholesale distributors including those located in New Jersey (R-27). These products are then sold by the distributor to physicians and institutions, and to drug stores for resale to consumers (R-31, 33, 34).

In addition to selling to New Jersey wholesalers, Eli Lilly conducts a vigorous fair trade enforcement program in New Jersey, as authorized by the terms of the New Jersey Fair Trade Law, N.J.R.S. 56:4-3 *et seq.*, to control minimum resale prices charged by retail drug outlets to consumers. Eli Lilly is party to some 1500 fair trade agreements with New Jersey retailers (R-30), and, pursuant to the terms of N.J.R.S. 56:4-6, enforces the law as against non-signers who fail to observe the prices so fixed.

The defendant-appellee, Sav-On-Drugs, Inc., operates retail drug stores in New Jersey. It has not signed an Eli Lilly fair trade contract. It purchases Eli Lilly products from New Jersey wholesalers.

Eli Lilly conducts its general business in interstate commerce in that the manufacture, shipment and sale by contract originates in Indiana. At the same time, Eli Lilly carries on an extensive sales promotion and fair trade policing program in New Jersey. For this purpose Eli Lilly employs in New Jersey a district manager, secretary, and 18 employees called "detail men". All of these employees work out of a Newark, New Jersey headquarters

listed under the name "Eli Lilly and Company" in the building directory, on the office door, and in the Newark telephone book (R-23). While the lease for the Newark office space is paid by the district manager, Eli Lilly reimburses him for all the expenses incidental to the maintenance and operation of the office (R-28). All of its local employee's salaries are paid by Eli Lilly. The functions of the New Jersey office and the "detail men", to repeat, are to promote sales by visits to retail pharmacists, physicians and hospitals, to describe to Eli Lilly customers Eli Lilly products, to promote prescriptions of Eli Lilly products by physicians, to check stores and inventories of retail druggists in order to ascertain whether a sufficient supply of Eli Lilly products are carried to meet potential demand, to recommend the enlargement of the available supply, and, when the occasion demands, to transmit orders to wholesalers, to supply the retailers with advertising and promotional material (R-25, 26, 29), to urge pharmacists, physicians and hospitals to order Eli Lilly products from wholesale distributors (R-27) and to police fair trade practices established by Eli Lilly (R-26, 3, 5). This last function is performed in order to protect Eli Lilly's property rights in that good will which attaches to its trade mark products sold in New Jersey (R-1).

POINT I

Eli Lilly is engaged in intrastate commerce both as a matter of fact and law; the operation of the foreign corporations registration statute as against the activities conducted in New Jersey does not violate the Commerce Clause of the United States Constitution.

Although the main question presented to this Court is the proper dismissal by the lower court of Eli Lilly's fair trade suit by virtue of plaintiff-appellant's failure to register in New Jersey as a foreign corporation pursuant to

the requirement of N.J.R.S. 14:15-4, Eli Lilly advances a broader issue for consideration which extends beyond the statutory sanction imposed by the lower court. Not only does the Indiana corporation assert error based upon its denial of access to New Jersey Courts, but, also insists that its commercial operations as presented in the record before this Court immunized it altogether from the requirement of registration in New Jersey pursuant to N.J.R.S. 14:15-3 *et seq.* This assertion is made despite the fact that the only basis upon which it seeks a New Jersey forum is to enforce a right accruing to it exclusively by operation of the New Jersey Fair Trade Law as applied to non-signers, N.J.R.S. 56:4-6.

It is essential, therefore, to understand the primary purpose and function of the statute drawn in question. As will be demonstrated in detail in Point II, *infra* the foreign corporation registration law is a statute utilized to gain information from corporations, transacting any business within the State, for the protection and interests of State authorities and its citizens. It is not a licensing provision that is extended as a privilege to foreign corporations which seek to do business in the State. Its provisions denying access to the courts of the State are imposed solely in the case of failure to give the information required, in the face of intrastate activity. This must be distinguished from mere refusal to afford access to New Jersey Courts predicated upon a privilege to do business in the State. In this regard the trial court, considering both the primary thrust of the registration law and the undisputed facts relating to the extensive promotional and policing activities of local Eli Lilly "detail men" could come to no other logical conclusion than to hold that Eli Lilly was in fact transacting business in New Jersey. While it may be true that the "detail men" did not directly sell Eli Lilly products to the retail customers, the statute does not require sales as such to bring their activities within the definition

of "transacting business." The extensive promotional activities are so local in character and so intermeshed with the company's economic advancement that to construe these activities as separated from the corporation's eventual sales to the retail druggist, would derogate the purpose of the foreign corporation registration law. To accept the operation of the act in the posture presented by Eli Lilly would permit any company engaged in inter and intrastate commerce on a national basis to avoid legitimate local registration by merely separating its sales and promotion functions. There is no question that Eli Lilly is partially engaged in interstate commerce. At the same time it operates on an intrastate basis to a point where its activities must be considered as mixed inter and intrastate in character. That Eli Lilly was refused access to New Jersey Courts while endeavoring to enforce the terms of the New Jersey Fair Trade Law as against non-signers; that the character of this consequence is the dismissal of this particular suit, is of no constitutional concern when it is based simply upon the fact that Eli Lilly has been operating in New Jersey and has failed to register because of its intrastate activities. In other words there must be no equating of the amount of business performed in the State with the failure to have access to the Court on the simple issue of enforcing a fair trade contract. Both New Jersey reliance on private discovery through the mode of permitting a statutory defense to be raised where a plaintiff corporation has not registered, N.J.R.S. 14:15-4, in addition to the imposing of a penalty sanction if the State discovers a foreign corporation doing business without registry, N.J.R.S. 14:15-6, are reasonable efforts to obtain compliance with the terms of the law.

Considered in this light, the ambit of the statute, regulation of local businesses or that part of interstate businesses carried on locally, is the same type of regulation which even Eli Lilly admits to be proper. In their jurisdictional

statement at page 11, the defendant-appellants manifest agreement of the validity of the doctrine initially expressed in *Paul v. Virginia*, 8 Wall, 168 (1868), which stands for the proposition that foreign corporations engaged in both inter and intrastate commerce must conform to local regulations while actually engaged in commerce within the State. See *Diamond Glue Company v. U. S. Glue Company*, 187 U. S. 611 (1903); *Interstate Amusement Co. v. Albert*, 239 U. S. 560 (1916); *Cheney Bros. v. Mass.*, 246 U. S. 147, 154-155 (1918); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450 (1959).

It is not necessary, however, to rest here. Even if the local promotional activities were considered to be so coupled with interstate commerce so as to be distinguishable as a matter of fact from the *Paul* doctrine, the use of the statutory fair trade enforcement policy as applied to non-signers is the use of a measure so local in character as to constitute intrastate activity by operation of law, requiring registration. This would result of course in the constitutional propriety of the statutory registration requirement and dismissal of the suit under review. For the purpose of argument it may be conceded that Eli Lilly conducts no promotional activities in the State of New Jersey; that it does not have an office here; that it merely executes contracts for the sale of its trade marked products in Indiana with New Jersey wholesalers calling for the shipment and sale of Eli Lilly products to said wholesalers in this State and, in addition, that it executes fair trade agreements in Indiana with New Jersey retailers to uphold its minimum retail prices. It may be even conceded that such fair trade contracts are executed in New Jersey. If the foregoing are true, then, under each of these hypotheses Eli Lilly, without any intrastate activity or local contract, is engaged exclusively in interstate commerce and suits arising directly out of such commerce could not be dismissed for failure to register. But cf. *U. S. Time Corp. v. Grand Union*

C. 64 N. J. Super. 39 (Chanc. 1960) where the trial court saw fit to distinguish the holding of *Eli Lilly* from activities regarded as being exclusively interstate in character.

However, a suit against a non-signer by operation of the New Jersey Fair Trade Law N.J.R.S. 56:4-6 does not concern an interstate transaction but rather, by virtue of its peculiarly local application, must be considered local in character. *Sunbeam Corp. v. Wenting*, 185 F. 2d 903 (3rd Cir. 1950). The background of the fair trade laws as refined by the congressional intent expressed in the McGuire Act, as a matter of fact and law, require the conclusion that fair trade enforcement as applied to non-signers, is an intrastate matter. Section 1 of the McGuire Act, 66 Stat. 632 (1952), 15 U.S.C.A. sec. 45 states that:

"That it is the purpose of this Act to protect the rights of states under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."

The operation of local fair trade laws against non-signers as sanctioned by the McGuire Act, *supra*, has always been regarded as local in operation and applying " * * * only to transactions within this state, that being the sole territorial extent of the legislature's powers." *Max Factor and Co. v. Koonsman*, 5 Cal. 2d 446, 55 P. 2d 177, 187 (1936). Such a conclusion is buttressed by the refusal to enjoin sales beyond state borders pursuant to non-signer

provisions under a state fair trade law. *Sunbeam Corp. v. Wenting, supra*; *Johnson & Johnson v. Weissbard Bros.*, 11 N. J. 552 (1953).

It is in this light that *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910) and the cases following, relied on by Eli Lilly must be considered and distinguished. Each falls into a pattern, the rule of law of which has been considered and conceded for the purpose of argument above in comparing Eli Lilly's actual local activities with a hypothesized exclusive interstate operation. Where a foreign corporation is suing on a transaction which arises out of interstate commerce, it cannot be denied access to state courts in an action to enforce the transaction that was part of the interstate commerce of the complainant. Thus, *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910) involved the enforcement of a contract relating to the sale of books in interstate commerce. *Buck Stove and Range Co. v. Vickers*, 226 U. S. 205 (1912), dealt with a suit on a fraudulent conveyance that arose directly out of interstate commercial activity. So did the transaction that gave rise to the suit in *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914), as did the actions in *Dahnke-Walker Co. v. Bundurant*, 257 U. S. 282 (1921) and *Furst v. Brewster*, 282 U. S. 493 (1931).

Therefore, it is urged that as a matter of fact, as related to the distinct admitted local activities of Eli Lilly in the State of New Jersey, and, by operation of law through a suit to enforce a fair trade statute against a non-signer, the activities conducted by Eli Lilly and sought to be controlled by it, are exclusively local in character and, hence, the operation of the New Jersey foreign corporation registration statute was constitutionally applied by the trial court.

POINT II

If Eli Lilly is regarded as being in interstate commerce the conditions imposed by N.J.R.S. 14:15-3 *et seq.* are entirely reasonable.

Despite the characterization of privilege given to the foreign corporation registration statute by Eli Lilly (Ab17), a careful analysis of the act will demonstrate clearly its manifest protective purpose:

N.J.R.S. 14:15-3 requires that every foreign corporation except banking, insurance, ferry and railroad corporations *** before transacting any business *** in New Jersey file with the Secretary of State:

- (1) a certificate of incorporation, attested by its president and secretary, under its corporate seal, and
- (2) a verified statement setting forth:
 - (a) the amount of its authorized capital stock and the amount actually issued;
 - (b) the character of the business which it is to transact in this state;
 - (c) the principal office of the corporation in New Jersey together with the name of an agent authorized to accept service of process.

Once such a statement has been filed, the terms of this section make it mandatory upon the Secretary of State to issue a certificate of authority to transact business. In addition, the Secretary of State is charged with the responsibility of determining, through an examination of the information so filed, whether the purposes for which the corporation has been formed, and which are set forth in the corporate charter, are such as may be lawfully transacted within this state. For failure to obtain such a cer-

tificate, a corporation is prevented from maintaining an action upon any contract made by it in this state. In addition, a corporation is subject to a penalty of \$200.00 for transacting business without the necessary certificate.

Despite Eli Lilly's mistaken label of purpose, it is essentially a regulation to protect the state and its citizens as regards activities carried on by corporations domiciled outside of this state when they see fit to pursue their purposes for profit in New Jersey. Whether a corporation is engaged in interstate commerce, mixing inter- and intrastate commerce or, as is urged in Point I, separate intrastate activities, the State of New Jersey has a constitutional and legitimate right to know generally who a corporation is, whether it intends to act lawfully and in accordance with New Jersey laws, and whether it will be subject to process here. It is a regulation of local activity, designed to insure that the laws will be observed and if not, that there will be a presence of corporate responsibility within the state.

This statutory design aimed at regulating the localized activities of a foreign corporation has been approved by this court as having the same validity as other types of police power exercised over intrastate activity carried on by persons engaged in interstate commerce. *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944) should control the case at bar. Minnesota imposed requirements upon foreign corporations, similar to those contained in the New Jersey Act. A foreign corporation, engaged in the customs brokerage business and subject to the federal customs laws, instituted an action in Minnesota for breach of a fiduciary relationship which was dismissed for failure to register there as a foreign corporation. This court, in upholding the local law as against the foreign corporation, after ruling that the state statute did not conflict with the federal customs laws, applied the well-settled test of determining to what extent state interests affected the pursuit of interstate activity locally. The Court balanced the demand made by the

state as against the nature of the transactions or activity conducted locally in applying the registration statute, in addition to determining whether the local requirement could be harmonized with the national interest of affording freedom to conduct interstate commerce. On these principles the Court observed that Minnesota was legitimately concerned with the interests of its citizens who dealt with foreign corporations doing business locally. The Court then stated at p. 210 of 322 U. S. that:

"The incidence of the particular state enactment must determine whether it has transgressed the power left to the states to protect their special state interests although it is related to a phase of a more extensive commercial process.

"The information here sought of all foreign corporations by Minnesota as a basis for granting them certificates to do business within her borders is a conventional means of assuring responsibility and fair dealing on the part of foreign corporations coming into a State. Apart from any question of interference with foreign commerce such a requirement is plainly within the regulatory power of a State. *** The burden, such as it is, falls on foreign businesses that commingle with Minnesota people, and the burden, a fee of fifty dollars, is sufficiently small fairly to represent the cost of governmental supervision of foreign business enterprises coming into Minnesota. In short, it is a supervisory and not a fiscal measure. As such it imposes costs upon the State which those who are supervised must, as is often the case, themselves pay."

And, further at p. 212 that:

"The Commerce Clause does not deprive Minnesota of the power to protect the special interest that has been brought into play by Union's localized pursuit of its share in the comprehensive process of foreign com-

merce. To deny the States the power to protect such special interests when Congress has not seen fit to exert its own legislative power would be to give an immunity to detached aspects of commerce unrelated to the objectives of the Commerce Clause. By its own force that Clause does not imply relief to those engaged in interstate or foreign commerce from the duty of paying an appropriate share for the maintenance of the various state governments. Nor does it preclude a State from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration. And so we conclude that in denying Union the right to go to her courts because Union did not obtain a certificate to carry on its business as required by the Foreign Corporation Act, Minnesota offended neither federal legislation nor the Commerce Clause."

The standards expressed above lend emphasis to the constitutional objectives of the requirements under review. In this regard, the foreign registration statute is no more than a reasonable instance of the imposition of local regulations over localized interests of persons engaged in various types of interstate commerce. The registration statute has as much of a legitimate purpose as do regulations over the safety of vehicles using local highways, insurance salesmen and importation of deleterious substances. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177 (1938); *Robertson v. California*, 328 U. S. 440 (1946); *Dean Milk Co. v. Madison*, 340 U. S. 349 (1951). And such regulations, as will be more fully demonstrated below, are not designed to exclude foreign corporations from doing business locally when there is a failure to achieve a specific standard of solvency, or a status that the local state has no power to control, *Crutcher v. Kentucky*, 141 U. S. 47 (1891).

Rather, in accordance with *Union Brokerage v. Jensen*, *supra*, the demand by New Jersey, of requiring foreign corporations transacting business locally to register is legitimate. Each requirement to supply certain information is related to the objective of affording protection and data necessary to the state and its citizens. Additionally, the local demand does not conflict in any way with Eli Lilly's nationally protected interest of furthering its business activities in interstate commerce.

As indicated above, the corporate charter when filed insures that the purposes and aims of the corporation as stated do not contravene the laws of this state. The ability to examine the charter insures the impartation of legitimacy to any corporation whose business affairs will be conducted within the State of New Jersey. Absent the necessity of such corporate revelation, a business association might conduct its affairs, through subterfuge, in the guise of a corporation and thus enjoy the legitimate benefits accruing to a foreign corporation without in fact being one. The obvious effect that such a method of operation would have upon the rights of the citizens of this state who dealt in good faith with such an organization, need not here be enumerated. The corporate charter would also reveal if a corporation properly organized had as a stated purpose for its existence an activity proscribed by the laws of this state. By this means the state insures to its citizens freedom from those activities which although lawful in the state of incorporation are deemed here in New Jersey to run afoul of the standards for legality demanded of a domestic corporation. These might include corporations organized for the purpose of running gaming establishments, or conducting business which, though lawful, must be subject to licensing control, i.e., insurance, banking, sales of intoxicating liquors.

Information of this sort should be available also in order to enable persons dealing with the corporation to determine

whether the corporation has the power to transact business in the manner the parties intend; for example, a sale of land might be beyond the corporate powers as expressed in the charter. This same protective necessity is found in the requirement that the statement which must be filed by the foreign corporation shall show the amount of its authorized capital stock and the amount actually issued. It is a matter of record that certain states have declared that it is unlawful for a domestic corporation of that state to issue stock in excess of its authorization. Fletcher, *Cyclopedia of the Law of Private Corporations*, 255 (Sec. 5129), 327 (Sec. 5144). To allow a corporation of one of these states to violate the laws of its home state and yet conduct with impunity its business here, would be to subject the citizens of the State of New Jersey to an unreasonable assault upon their full right to a knowledge of the parties with whom they will deal in the local conduct of their affairs. The requirement that the statement filed by the corporation shall set forth the character of the business is necessary to prevent misinterpretation of the purposes of that business as set forth in the corporate charter, and also insure that where a corporation has several purposes, some of which are illegal in this state, only those allowable functions are carried on.

Information expressed in the statement is vital to state authorities to enable them to ascertain corporate presence within the state for subjection to tax laws or regulatory statutes such as our Workmen's Compensation and Unemployment Compensation Laws, if such taxes and regulations can be applied as a matter of fact and law. In this regard, Eli Lilly's characterization (Ab25) of the automatic nature of imposed taxation is untrue. While that issue is not present here, nevertheless, appellants omission of the basis for taxation should be pointed out. The statute, N.J.R.S. 54:10a-6,8 and appropriate rule New Jersey Corporation Tax Division Reg. 16:10-1.160 which follows the general rule, cited by Eli Lilly, subjecting foreign corporations doing business in this state to taxation on business

done here, specifically establishes a formula which delineates the criteria which must first be examined to determine the extent, if at all, the corporation is so subject. It is to be noted that the filing of such information is in no wise in excess, and indeed is less, than that imposed on domestic corporations.

This statute is designed not only to afford, through its protection, benefits to the citizens of the State of New Jersey; foreign corporations by registering are benefitted thereby. It must be stressed that New Jersey through the operation of N.J.R.S. 14:15-3 *et seq.*, is not concerned in particular with the activities in this state of Eli Lilly. It is concerned with all foreign corporations which have access to this State, including those corporations, persons acting under alleged corporate authority, persons holding themselves out as corporations, as well as corporations who are not in fact such in a foreign state of purported registry. It is designed to assure:

*** responsibility and fair dealing on the part of foreign corporations coming into a state *** *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 210 (1944).

It is not beyond speculation to assume that the registration of a foreign corporation in this state offers a self-imposing confidence in cases where persons desiring to know of the veracity of a corporate representation have access to public information provided by the Secretary of State of the corporate existence, its state of domicile, and that it is acting in a lawful manner. For example, if a citizen of the State of New Jersey were approached by a salesman representing himself to be from a foreign, or even a domestic corporation, and the prospective buyer, beset with doubt as to possible fraud, questioned whether a transaction could be legally consummated, what better means could be found of assuring corporate legitimacy to the citizen than through this information filed with the Secretary of State. In this

regard, if a corporation is legitimate and an inquiry may be made, the local citizen would be far more likely to enter into such a transaction than if such information was not available to satisfy his inquiries. Such a benefit is akin to the quality afforded by a trademark. Additionally, the validity of the statute and its application here afford Eli Lilly, together with all other corporations including its competitors, access to information regarding the corporate activities of each other. If such a statute, or its application, were declared to be invalid the information would not be available and no foreign corporation could ascertain with any certainty the extent to which another corporate entity was operating in New Jersey.

One other aspect of the New Jersey foreign corporation registration act must be considered, in addition to its protective and beneficial functions. N.J.R.S. 14:15-3(e) provides for the appointment within this State of a registered agent upon whom process may be served. Appellant seeks to make much of this provision, both by its claim that *Groel v. United Electric Co.*, 69 N. J. Eq. 397, 60 Atl. 822 (Ch. 1905) provides that the New Jersey statute subjects a foreign corporation to the state's general jurisdiction, and, by its claim that such a provision, rendering a foreign corporation amenable to suit, is unnecessary in the light of the minimum contacts rule of *International Shoe Co. v. Washington*, 326 U. S. 310 (1945) and *McGee v. International Life Ins. Co.*, 355 U. S. 220 (1957).

As to both contentions Eli Lilly is in error. *Groel* merely interpreted the effect of the 1894 statute, as regarded the service of process; it was not designed to confer any greater jurisdiction than had previously obtained. Certainly, it conferred no general jurisdiction.

As to the second contention, Eli Lilly asserts that since the decisions in the *Shoe* and *McGee* cases, it is no longer necessary to provide a statutory means to insure corpo-

rate presence within the state for the purpose of service (Ab21). Aside from this tacit admission of pre-1945 necessity for such a statute, appellant in this argument advances no other support for this proposition other than those cases which find sufficient contact to permit service without a violation of due process. New Jersey, it is thus contended, may afford, by statute, no means to its citizens to effect service on foreign corporations, because any attempt to do so would be to unreasonably burden interstate commerce.

That the State may, through the exercise of its police power enforce measures designed to afford convenience to its citizens is a doctrine long approved by this Court. *C. B. & Q. Ry. Co. v. Drainage Commr.*, 200 U. S. 561, 592 (1906). Since then, as Eli Lilly admits is here the case, there existed a necessity for providing, before 1945, some method by which the citizens of New Jersey might serve process upon a foreign corporation when appropriate, statutory provisions therefor must be considered both protective and convenient. Nor does the advent of *Shoe* and *McGee* act to preclude the State from providing for its citizens this convenient and appropriate means of effecting service. Certainly the jurisdiction here imposed is no greater than that afforded by the minimum contact rule. Moreover, this Court has said that the mere existence of an alternative method of proceeding will not serve as a basis for striking down the method used, if interstate commerce is not unreasonably burdened thereby.

"These safety measures carry a strong presumption of validity when challenged in court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field. Unless we can conclude on the whole record that the total effect of the law as a safety measure is so

slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it' (Southern Pacific Co. v. Arizona, *supra*, pp. 775-776) we must uphold the statute."

Bibb v. Navajo Freight Lines, Inc., 359 U. S. 520, 524 (1958).

As may be seen by the foregoing analysis of the New Jersey statute, and by the clear showing of protection, benefit and, where appropriate, convenience, Eli Lilly's contention that the statute creates a direct burden on interstate commerce is not impressive. To comply with the requirements all that is required of Eli Lilly is paper work, an unassuming demand at most.

All of these reasons support the historically valid constitutional principle that a regulation of any type that affords local protection and is applied to activity that is carried on within a state and not beyond its borders, if not burdensome to interstate commerce, will be sustained in its application. This is so notwithstanding the interstate character of the corporation coming within the purview of the regulation.

To repeat, the erection of reasonable burdens upon a corporation engaged in interstate commerce, insofar as local activity is concerned, has been recognized as constitutionally proper, *Union Brokerage v. Jensen, supra*. Even cases relied upon by the appellant as dictating an opposite result in this cause are consistent with this proposition.

In *International Text Book Co. v. Pigg*, 217 U. S. 91 (1910) this Court held unconstitutional the application of the Kansas Qualification Statute which required the filing of information clearly onerous and beyond the power of the Kansas Legislature to control. That statement as required by Section 1283 of the Kansas Statute, demanded informa-

tion relating to authorized capital stock, paid up capital stock, par value and market value per share of the stock, a detailed statement of assets and liabilities of the corporation, and in addition, a full and complete list of the stockholders together with their addresses and the number of shares held and paid for by each. This was the sole unconstitutional feature of the Kansas Statute which caused this Court to upset its operation as against the Pennsylvania Text Book Company seeking to enforce a contract arising directly out of interstate commerce. Indeed a close analysis will demonstrate that the non-access provisions of the Kansas Statute were not declared to be unconstitutional as such; that the prohibition which caused the dismissal of the Kansas suit by the Pennsylvania corporation was declared to be constitutional as a matter of statutory construction only because this Court found no basis for separating this provision from the onerous and unreasonable part of the statute. In addition, it might be pointed out that the Kansas Charter Board, by the terms of this statute, had discretion to approve the application based on its findings of solvency.

The New Jersey requirements are completely distinguishable. The terms of the statute make it mandatory that the Secretary of State issue the certificate once the statement has been filed. The terms of the New Jersey requirements, as heretofore illustrated, do not require information that is beyond the New Jersey Legislature's power to control. For instance, New Jersey demands nothing in the way of information regarding either corporate solvency, or the names, addresses and amounts of shares held by each shareholder. In fact, while New Jersey, pursuant to another section of its corporation law (the annual report to be filed by both domestic and foreign corporations doing business in this State (N.J.R.S. 14:6-2(g))), demands that each corporation file a statement affirming the fact that it has displayed at the entrance of its registered office the name of

the corporation, and that the books of the corporation be kept at that office, open at all times to the examination of its stockholders (including a stock transfer book containing the names and addresses of the stockholders and the number of shares held by each), nevertheless, the state recognizes its own limitations in regard to foreign corporations, and specifically exempts the application of this requirement to foreign corporations and those types of corporations which are regulated by separate statutes. This is indicative of the practice of self-restraint that was absent in Kansas. In addition, as was asserted in Point I, *supra*, the suit sought to be maintained in the Kansas Court arose directly out of an interstate transaction which is not the case here. The *Pigg* case on its facts, therefore, is completely distinguishable from the instant case both as to the standard of law regarding local regulation and as to the character of the transaction that was the subject of suit.

In *Buck Stove Co. v. Vickers*, 226 U. S. 205 (1912), this Court held that the same Kansas Statute considered in *Pigg* could not be used to deny access to the plaintiff for the reasons expressed in *Pigg*. In addition, the suit on a fraudulent conveyance of land arose directly out of interstate activities on the part of the plaintiff.

Sioux Remedy v. Cope, 235 U. S. 197 (1914) is not helpful to support the thesis advanced by Eli Lilly that it is completely immune from the requirements of the New Jersey foreign corporation registration statute. The South Dakota statute required that any foreign corporation transacting business in that state was prohibited from (1) acquiring, holding or disposing of real, personal or mixed property within the State, and (2) suing or maintaining any action at law or otherwise in any of the courts of South Dakota. These prohibitions continued until it filed a copy of its corporate charter with the Secretary of State. Further, no action could be commenced or maintained upon

any contract, agreement, or transaction made or entered into in South Dakota by the corporation unless that foreign corporation appointed a resident agent upon whom process could be served in any action to which it was party. Those demands as compared with the requirements of the New Jersey statute are burdensome as applied to a foreign corporation endeavoring to maintain an action arising directly out of interstate commerce, in the *Sioux* case a suit to enforce the payment of the purchase price for merchandise sold and shipped from Iowa into South Dakota. The specific terms of the South Dakota statute required submission to general jurisdiction in return for the right to do business in that State. In addition, a corporation engaged in interstate commerce was expressly prohibited from acquiring or disposing of any type of property. Those conditions patently imposed a direct burden on interstate commerce; one which lacked any reasonable relationship to a registration statute considered to be informational in character. Not only was access denied to South Dakota courts, but moreover, intrastate transactions were specifically prohibited and could be considered as unlawful and void in the light of the property transfer qualifications imposed prior to registration. Compare these statutory conditions with those of New Jersey. New Jersey does not prohibit interstate transactions as such nor does it condition the sale of property in the state by a foreign corporation upon registration. Indeed, the suit limitation applies only to contracts made within this State and not to interstate transactions as such (see opinion of court below (R-42) regarding the intrastate connotation of the fair trade suit which is based on a contractual relationship created by operation of law). This court, in fact, recognized in *Sioux* the right of a state to enact reasonable measures to promote the health, safety, morals and welfare of its people even though interstate commerce be incidentally or indirectly affected thereby. At the same time a state cannot impose conditions with respect to the carry-

ing on of interstate commerce, or to transactions arising therefrom, when such conditions are unreasonable or reach beyond the bounds of suitable local protection, *Id.*, at pages 203-205 of 235 U. S. Therefore, while *Sioux* found that no relationship existed in refusing access for failure to submit to the general jurisdiction in any type of suit because this restriction exceeded local power to regulate interstate commerce, it did not forbid the imposition of reasonable requirements which, it is urged, are present in the New Jersey law. Again, as asserted in Point I, *supra*, it is conceded that a corporation engaged in interstate commerce which seeks to enforce a contract arising out of an interstate transaction cannot be precluded from gaining access to New Jersey courts for the purpose of pursuing its right which is based on its interstate activity. This is far different, however, from the problem as presented here where, as a consequence of failing to register, Eli Lilly is prohibited from maintaining an action arising by virtue of New Jersey law that is not connected with interstate commerce, but with exclusively local promotional and fair trade policing activities. The same principle that caused the Kansas statute in *Pigg* to be unconstitutional as applied to interstate transactions is applicable also to *Sioux*. South Dakota by operation of its qualification statute could not control or condition the interstate commerce activities of Iowa corporation in *Sioux*.

Furst v. Brewster, 282 U. S. 493 (1931) should be considered in the same light. Aside from the fact that the plaintiff's suit was dismissed because it arose directly out of an interstate transaction, the Arkansas statute required information relating to matters beyond the control of the local legislature. A statement of the plaintiff's assets and liabilities in addition to the amount of capital employed in the local state was required from the foreign corporation, together with the designation of a general office or place of business in the local state, as well as the name of an

agent upon whom process could be served. This statute, too, far exceeded the power of control which the local legislature could effect upon a foreign corporation and, as measured against the New Jersey statute is far more offensive in addition to imposing unreasonable burdens.

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 (1921), is distinguished. It stands for the conceded proposition that, as a matter of fact, a suit arising directly out of interstate commerce cannot be dismissed for failure to register. The court did not consider, or criticize the requirements of the local statute as it applied to the activities of a foreign corporation.

From a reading of all the cases cited by appellant and especially those which are stressed in support of the alleged assertion that the New Jersey registration statute as a whole cannot, in its operation be applied to Eli Lilly under any circumstances, it is urged that an analysis of the reasons supporting the existence of the sanctions, in addition to placing in proper perspective that sanction which has caused a dismissal of the action under review, demonstrates that the statute on its face, and as applied to Eli Lilly, only indirectly affects its interstate activities. Furthermore, even that application does not unreasonably burden the furtherance of Eli Lilly's right to do intrastate business in New Jersey in furtherance of its interstate activities.

CONCLUSION

The Court below correctly applied the sanction of non-access to Eli Lilly in view of its failure and refusal to provide by registration, appropriate information designed to protect and serve the interests of the State and its citizens. Eli Lilly cannot complain of such a reasonable requirement in light of its avowed New Jersey activity. Therefore, it is respectfully submitted that the judgment below be affirmed.

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